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No. 81-2403

IN THE

Supreme Court of the United States

October Term, 1981

MARILYN THRELKELD and DANIEL HANKA,
Appellants,

vs.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO,
Appellee,

and

STATE OF MINNESOTA and MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

MOTION TO DISMISS OR AFFIRM OF APPELLEE ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO

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QUESTION PRESENTED

Does M.S.A. §179.65 Subd. 2 violate the provisions of the First and Fourteenth Amendments to the United States Constitution by allowing a union to collect a fair share fee from non-union unit members based on the union dues paid by its members less all members-only benefits, which in this case included all political and ideological expenses unrelated to collective bargaining, all specific benefits available only to members and all charitable activities, or 15% of members dues whichever is greater.

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ON APPEAL FROM THE SUPKEME COURT OF THE STATE OF MINNESOTA

MOTION TO DISMISS OR AFFIRM OF APPELLEE ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872, AFL-CIO

I.

STATEMENT OF THE CASE

Both the pre-amendment and post-amendment "fair share fee" statutes require non-union unit members to pay

the exclusive bargaining representative a fee allocating the costs of their representation. The pre-amendment statute allowed a fee equal to ". . . a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures." See J.S. App. 130a. In its initial decision in this case, the Minnesota Supreme Court recognized that the fair share statute was designed "to promote orderly and constructive relationships between all public employees and their employers . . .," by permitting the selection of an exclusive bargaining representative, and by requiring all of the employees who are represented to pay a fair share of the costs of that representative. *Robbinsdale Education Association v. Robbinsdale Federation of Teachers, Local 872*, 307 Minn. 96, 239 N.W.2d 437, 439 (1976). Applying the normal presumption of the constitutionality of a legislative enactment, 239 N.W.2d at 440, that Court construed the Act as affording a right to District Court review of the amount of the assessment, and to an appropriate escrow arrangement for the disputed fees pending a determination in the action. As so construed, the Minnesota Court held that the statute met the requirements of procedural due process. That Court specifically rejected the contention that due process of law required a hearing prior to the deduction of the fee from their wages. 239 N.W.2d at 444.

When the amendment became effective on April 1, 1976, the pre-amendment statute and case became moot. This Court recognized that fact and, on October 12, 1976, vacated and remanded Appellants' first appeal dealing with the pre-amendment statute, stating that "further consideration, in light of Chapter 102 of 1976 Session

Laws of Minnesota" was required. (Chapter 102 contained the post-amendment statute.) 429 U.S. 880 (1976).

The post-amendment statute allowed a fee ". . . equal to regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues" (M.S.A. §179.65, Subd. 2). In addition, the post-amendment statute adopted specific requirements designed to ensure due process. "Advance written notice of the amount of the fair share fee assessment to . . . all employees within the unit" was required. A challenge was allowed, if instituted within thirty days. Challenges were to be adjudicated by the Bureau of Mediation Services (BMS) (M.S.A. §179.71, Subd. 2), with review by the Public Employment Relations Board (PERB) (M.S.A. §179.72, Subd. 3), and later by the Courts. During the challenge procedure all challenged fees "shall be held in escrow by the employer pending a decision by the director pursuant to Section 179.71, Subd. 2." In fact, the challenged fees of Appellants remain in escrow to this date, and will remain in escrow pending this Court's determination.

The "members-only benefits" language of the Minnesota statute has been construed as including political and ideological activities unrelated to collective bargaining, as well as the cost of direct benefits not available to nonmembers. In other words, no amounts assessed to nonmembers may include any costs of political and ideological activities or costs of benefits that are available only to members. Janice L. Lemmers, AFSCME Council 6, Local 694 and State of Minnesota, Bureau of Mediation Services

case No. 89-FSC-607-A, April 30, 1982, p. 3.[1] And by virtue of the statutory escrow procedure, there is no risk than an objector's funds will be used for any purpose pending a determination of the challenge.

After proceedings before the appropriate administrative agencies and the State Courts, the Minnesota Supreme Court ruled:

> In *Robbinsdale Education Association,* we held that the financial stability of exclusive representatives was of such importance as to override the need to determine the "fair share" fee's validity *prior* to its imposition. We likewise there indicated that nonbargaining unit members [3] had certain remedies to protect their rights. Finally, we invited the attention of the legislature to the question of providing a resolution of the problem. Since that decision was "vacated" by the United States Supreme Court, it presently is without force or effect. *In re Estate of Hallbom,* 189 Minn. 383, 249 N.W. 417 (1933).
>
> We have now reviewed our prior opinion in *Robbinsdale Education Association.* We herewith reinstate it with respect to this case as it existed prior to the 1976 amendment. Moreover, we have concluded the amended statute affords to appellants substantial first and fourteenth amendment rights that the original statute did not. Accordingly, we affirm the trial court. 316 N.W.2d 551 (Minn. 1982) (J.S. App. 6a-7a.)

The amount of money involved in the instant case is de minimus. Presuming that some fee must be paid each

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[1]In this case, the exclusive representative excluded from its assessment of the fair share fee expenditures the costs of: all political and ideological activities unrelated to collective bargaining; specific benefits available only to members; and all charitable activities.

year, *Abood*, infra, Appellants cannot hope to gain more than a few dollars per year, if they prevail.

Appellants have challenged the constitutionality of these statutes under the First and Fourteenth Amendments to the United States Constitution. They allege that use of the "residuum theory" foreclosed them from showing that expenses assessed fell outside the scope of allowable fees. In so doing, their essential complaint is that Appellee RFT did not meet the burden of proving that it is entitled to the fees collected. Whether the RFT proved its case is a factual rather than a legal issue. That question most certainly does not contain issues of Constitutional significance.

It is Appellee RFT's position that Appellants' Jurisdictional Statement does not present a Substantial Federal Question, and must be dismissed, or in the alternative the decision below must be summarily affirmed.

II.

THE INSTANT CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

It is the position of Appellee RFT that:

1. Four cases decided by this Court have already upheld the validity of similar fees against Constitutional challenge, and, therefore, Appellants' issues have been foreclosed by Court precedent, and do not present Substantial Federal Questions; and

2. That the reasons asserted by Appellants, and their supporting arguments, are without Constitutional significance and do not carry the instant facts beyond the scope of the already de-

cided cases. Therefore, the Court is not being presented with a Substantial Federal Question.

For either or both of the above reasons, the Court should dismiss the case, or summarily affirm the decision below.

A. THE ISSUES PRESENTED ARE FORECLOSED BY THE PREVIOUS DECISIONS OF THE SUPREME COURT AND, THEREFORE, DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

1.

Litigation involving fair share type fees is not new to this Court. Between 1956 and 1976, the Court decided four cases involving fair share type fees.[3] In each case, the Court expressly affirmed this type of fee against Constitutional and/or statutory attack. For purposes of this motion only, the *Abood* case will be examined in detail. The reasons being that *Abood* cites, affirms and discusses the relevant portions of each of the previous three cases, and that, similar to the instant case, *Abood* involves a Constitutional challenge to a statutorily allowed fee in the public sector, a factual pattern not presented in any of the previous three cases. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood*, a 100% of members' dues fee, negotiated pursuant to statutory authority in the public sector was challenged under the First and Fourteenth Amendments.

The *Abood* Court thoroughly discussed all three of the previous cases, with particular emphasis upon *Hanson* and *Street*.

It concluded that:

---

[3]See *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956); *Machinists Association v. Street*, 367 U.S. 740 (1961); *Railway Clerks v. Allen*, 373 U.S. 113, 83 S.Ct. 1158 (1963); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1976).

> To compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests. . . . [It] might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. . . ." (p. 222).

Under *Abood's* reading of *Street* and *Hanson*, while an individual may disagree with a union's use of funds, or may even claim that such use was of no benefit to him, that person was not privileged to withdraw support as long as the expenditure was made for unit purposes. The *Abood* Court considered whether the public sector employee has greater First Amendment rights than the private sector employee. The Court said simply: "We think he does not." Id. at p. 229. Even the argument that public sector bargaining was inherently political was not found to be persuasive (pp. 228-229).

The Court did say, at p. 232, that "the differences between public-and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Hanson* and *Street* were found to control (p. 232).

Abood upheld the Constitutional validity of a public sector statute providing for an agency fee. To defray the costs of representation when objection is made, certain expenses are to be excluded from the fee. Id. at 234. As long as the union is expending the monies for unit purposes, the individual has no complaint, even if he believes the expenditure will not benefit him. Id. at 225.

2.

This Court has outlined the formula for the determination of a constitutionally proper fair share fee: "The financial support required relates, therefore, to the work of the union in the realm of collective bargaining" (p. 235). *Street* (p. 768), *Allen* (p. 121) and *Abood* (pp. 225-226) all basically ruled that collection was permissible to help "defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances..." (p. 768).

Street, Allen and *Abood* each discuss what union expenses may not be charged to an objecting employee. All three agree that political and ideological expenses unrelated to collective bargaining must be eliminated. No other specific deduction has yet been required. In order to overcome the payor's burden to support the union, any further category of deduction must pass the *Hanson* impingment of Constitutional rights test. *Abood,* in interpreting *Street* and *Hanson,* ruled that such fees do affect the payor's Constitutional rights, but that such impingement was Constitutionally permissible. 431 U.S. at 225.

The Minnesota pre-amendment statutory formula complies with the formula set out by this Court. It allowed a fee equal to "a pro rata share of the specific expenses in-

curred for services rendered by the representative in relationship to negotiations and administration of grievance procedures" (M.S.A. §179.65, Subd. 2, pre-April 1, 1976, J.S. App. 129a). This formula matches that determined in *Street, Allen* and *Abood* (this formula was upheld against Constitutional attack by the Minnesota Supreme Court, 307 Minn. 96, 239 N.W.2d 437 (1976).)

The amended statutory formula even more fairly allocates the costs to non-members. A non-member will never be required to pay a fee greater than 85% of members' dues. He/she can challenge the fee assessed at an adversary hearing and there the union bears the burden of proof as to the fee charged. Under *Street, Allen* and *Abood*, to obtain any reduction, a non-member must affirmatively object. But, in Minnesota, the union must presume an objection by eliminating all members-only benefits, or 15% of the fee, whichever is greater. The formula espoused by the amended statute, complete with the availability of a full adversarial challenge upon request, more than fully complies with the formula required by the case law.

3.

As applied to the instant issue raised by Appellants, the above law requires the Court to dismiss Appellants' appeal. Four Supreme Court cases in the last 26 years have consistently ruled that imposition of the Minnesota type fee meets Constitutional requirements under the First, Fifth and Fourteenth Amendments. Those cases involved fees allowed by both State and Federal legislation, and in both the public and private sectors. The formulas prescribed by the case law have all been similar to or less strict than the formulas found in either Minnesota fair

share fee statute In short, the U.S .Supreme Court has already validated the imposition of fair share type fees, under the First and Fourteenth Amendments, which arise in the public sector by virtue of a State statute (see *Abood).* Likewise, the U.S. Supreme Court has already validated the particular formula found in the Minnesota fair share fee statute (see *Abood*). The U.S. Supreme Court has already validated the mechanism used in Minnesota to determine the particular fee to be assessed a non-member, i.e. by determination and subtraction of non-collectible costs (see *Allen).* Finally, the U.S. Supreme Court has already determined that non-union unit members may not object to fees spent for unit purposes related to representation since they have an obligation to share in those expenses (see *Street, supra,* and *Abood, supra*).

B. THE INSTANT ISSUES ARE WITHOUT CONSTITUTIONAL SIGNIFICANCE AND, THEREFORE, DO NOT RAISE A SUBSTANTIAL FEDERAL QUESTION.

1.

The instant case does not present open issues of Constitutional significance. While Appellants have framed their arguments by using Constitutional terms, and by citing Supreme Court opinions, the essence of their argument presents neither new nor significant Constitutional theories. Rather than asserting a coherent argument, Appellants have assembled several unrelated groupings of cases, each grouping presenting a different Constitutional issue. Appellants' attempt to explain how their issues are analogous to the particular grouping of cases cited is not persuasive, as we now show.

2.

a.

Appellants first argue that the statute provides the Union with an irrebutable presumption, citing several cases which hold that irrebutable presumptions were in violation of Constitutional guarantees.

An "irrebutable presumption" is defined in *Black's Law Dictionary*, Fourth Edition, p. 1349, as follows:

> . . . a rule of determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise.

When M.S.A. §179.65, Subd. 2, is judged against the above standard, it is clear that it does not contain an irrebutable presumption. Appellants argue that use of the residuum theory (the substraction of members-only benefits or 15% of members' dues, leaving a residuum of expenses chargeable to the fair share payor) resulted in their being unable to challenge the fee. This is untrue. The statute, on its face, allows the Appellants to challenge the fee assessed. The Appellants, in fact, did challenge the fee at adversary hearings which lasted several days.

At the hearings, before the Budeau of Mediation Services, the Union introduced exhibits that showed its total expenditures, and the amount of the "members-only benefits." February 1, 1978, BMS Hearing, Tr. 36-49; November 20, 1978, BMS Hearings. Tr. 32. Witnesses were produced who were able to answer questions concrening these exhibits. February 1, 1978, BMS Hearing, Tr. 34ff; 97ff; November 20, 1978, BMS Hearing,

Tr. 17ff; December 6, 1978, BMS Hearing, Tr. 20ff. At the request of counsel for Plaintiffs, the Union produced monthly expense summaries showing all the Union's expenditures by category. November 20, 1978, BMS Hearing, Tr. 56, 60-61; December 6, 1978, BMS Hearing, Tr. 2. Nothing was "irrebutable." The objectors were free to explore or to challenge each and every expenditure in those exhibits, but failed to do so. Instead, they stood on their unsound position that no expense, even a collective bargaining expense, can be included unless it is shown to specifically benefit the objector. December 6, 1978, BMS Hearing, Tr. 2-11

The Minnesota Court properly concluded:

> A review of the records made available to this Court indicates that plaintiffs received adequate notice and opportunity to challenge Robbinsdale Federation specification of members-only benefits not to be included in the fair-share fee.***
>
> The record indicates that the administrative agencies correctly found that the Robbinsdale Federation sustained its burden under that theory.
>
> ***
>
> Moreover, a reading of the record indicates that the Federation apparently gave plaintiffs' counsel everything he requested either preceding the hearing or at the time of the hearing. [J.S. App. 16a-17a.]

Insofar as the definition requires that the statute forbid the showing of "any proof that the fact is otherwise,"

M.S.A. §179.65, Subd. 2, does not contain an irrebutable presumption.[5]

b.

Appellants next contend that the fair share fee is a "tax," and that a tax for private benefit is in violation of the Constitution. Appellants appear to argue that any fair share type fee is an unconstitutional tax, and, thus, barred in its entirety. This theory is not new. As shown above, it has been determined that fair share type fees do affect Constitutional rights, but are, nevertheless, Constitutionally valid under the First, Fifth and Fourteenth Amendments (*Hanson* and *Abood*). Once such holdings are recognized, it should make little difference what semantic games Appellants wish to play. The payment of a fair share fee to a union which is required to represent all unit members, and which incurs costs in such representation, is a Constitutionally valid mechanism, whether it be called a "fee" or a "tax."

If Appellants' argument is that, in order to qualify as a fee, some benefit must be shown, then that issue was resolved by *Abood*, which recognized that some unit members will never be satisfied with the union's actions, and will never agree that the union benefits them. When the

[5]Even if the statute contained an irrebutable presumption, that theory would not present a Substanial Federal Question under the instant facts. Subsequent to the line of cases cited by Appellants, the Court decided *Weinberger v. Salfi*, 422 U.S. 749 (1975). Under the social security law, a person may not collect spousal survivor's benefits unless married for nine months before the spouse's death. No evidence may be received to vary this rule. The Court upheld the validity of the statute under an "irrebutable presumption" attack, saying that the classification was rationally related to a legitimate legislative goal (Id. at 769). In so doing, the Court distinguished between a non-contractual government benefit, in *Salfi*, and the fundamental personal liberties in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), and *Stanley v. Illinois*, 405 U.S. 645 (1972), Id. at 771.

union's expenditures relate to employee representation, benefit is presumed. In *Hanson*, the Court noted that in passing the Railway Labor Act:

> Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost, and that legislative judgment was surely an allowable one. [351 U.S. at 235.]

The *Abood* Court, referring to the "benefits of representation that necessarily accrue to all employees," 431 U.S. at 222, has determined that such a judgment is Constitutional in the context of a state statute governing public employees. No new or substantial Constitutional issue is presented.

Even if this Court had not already so ruled, the Minnesota law plainly meets the Fourteenth Amendment's requirement that the payment be rationally related to a Constitutionally permitted end. Plainly too, there is no substance to Appellant's argument that due process is violated, unless the Union is required to show that each of its expenditures for collective bargaining activity produced a tangible gain for the objecting employee in the sense of making that employee better off than he would have been if the expenditure had not been made. (J.S. App. 11-13, 17-19.)

The fair share statute begins:

> All public employees . . . may be required . . . to contribute a fair share fee for services rendered by the exclusive representative. [M.S.A. §179.65, Subd. 2]

We cannot conceive of a clearer expression of a legislative judgment that it is fair and proper for each bargaining unit member to pay his share of the costs incurred by

his exclusive representative in carrying out its obligation to serve all the members of the unit. The legislature has concluded that the performance of those services is a benefit to all concerned

c.

Finally, Appellants argue that the collection of the fee prior to a hearing violates due process. What Appellants have neglected to show is that the post-amendment statute not only provides for notice of the assessment, and allows a hearing upon a challenge; but it also requires the placement of all challenged monies in an escrow account, pending a decision (M.S.A. §179.65, Subd. 2). The hearing allowed is an adversary hearing, complete with examination and cross-examination of witnesses, and the ability to introduce other evidence. It is held before a neutral party, the Bureau of Mediation Services, a State Agency. These safeguards meet due process standards as stated by this Court.

Procedural due process does not require any particular form of proceedings. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974). In *Mathews v. Eldridge*, 424 U.S. 319 (1975), the Court held that due process of law does not require a hearing prior to the termination of Social Security disability benefits payments. The Court rejected the claim that the hearing must necessarily precede the deprivation. Id. at 333. Rather, the Court held that:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the

> probable value if any, of additional or substitute procedure safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Id. at 335.]

First, "the private interest" that is affected by the deduction of fair share fees without a prior hearing as to excludable amounts is minimal. The largest of the fair share assessments in this case was approximately $11 per month (November 20, 1978 BMS Hearing. Tr. 21), or less than one percent of the employee's wages. As a fee at some level is surely proper, the potential wrongful deprivation is only a fraction of this amount. By contrast, in *Mathews*, the private interest was the receipt of disability benefits, which could well be the recipient's sole means of support. As a prior hearing was not required in *Mathews*, it surely is not required here.

Second, the risk of an erroneous deprivation is relatively slight. The statute provides that a fair share fee cannot exceed 85% of regular union dues. This reflects a legislative judgment that, in most cases, excludable expenditures will not exceed this amount. As the exclusive representative must be prepared to document its assessment prior to the receipt of the funds, the risk of a significant overcharge is slight. By automatically escrowing disputed funds, there is no "risk that [a dissenter's] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Abood*, at 244 (Stevens, J., concurring). The only additional advantage of a pre-deduction hearing is to avoid an erroneous temporary deprivation to the employee of a small portion of the fair share fee.

Third, the State's interest in authorizing deductions prior to a hearing is substantial. *Abood* and its predecessors recognized the substantial governmental interest in promoting the financial stability of exclusive representatives by allowing the assessment of fees from all persons to whom it is obligated to provide representational services. See *Abood*, at 221-222.

A failure to deduct fair share fees, pending the resolution of a challenge, would place in jeopardy the ability of the Union to collect an assessment that is sustained, either because the protestor may leave his employment, or because the fees accrued over a period of time may total a substantial amount. Loss of these fees, covering periods in which the representative is obligated to represent all employees, could undermine the basic statutory policy. (See *Allen*). The only workable procedure is one which assures that whoever wins the dispute will receive the money. This is accomplished by the Minnesota statute.

III.

CONCLUSION

Appellants must do more than cite cases which have been decided to contain Constitutional violations. There must be some showing how those cases control the instant case, and how the instant case involves significant Constitutional issues. As shown, the Court has ruled that the fair share type fee is Constitutional. It has allowed exceptions only where they involve Constitutionally significant issues. When Appellants raise new issues or Constitutionally significant issues, they may be granted an argument. To date, they have not raised such issues. The Supreme Court has decided the fundamental issues in *Abood*. It

should not be asked to expend its time reviewing other procedures promulgated by State Legislatures regarding public employees which have been reviewed and upheld by the State Supreme Court with the benefit of the principles announced in *Abood*. The Court should dismiss this case or summarily affirm the decision below.

Respectfully submitted,

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